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CASE NO. ———

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IN THE

# Supreme Court of the United States

SPRING TERM

Grinnell Mutual Reinsurance Company, an Iowa Corporation,

*Petitioner,*

vs.

Empire Fire & Marine Insurance Company, a Nebraska Corporation, et al,

*Respondents.*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## BRIEF FOR RESPONDENTS EXCALIBUR INSURANCE COMPANY OF MINNESOTA AND RIECHMANN ENTERPRISES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## A. QUESTIONS FOR REVIEW

1. Did the Eighth Circuit correctly apply Illinois insurance law in determining that petitioner Grinnell Mutual Reinsurance Company (Grinnell) extended coverage to Hamel Service Company (Hamel) and Gilbert Culver (Culver) for the motor vehicle accident of July 9, 1979?

Respondent submits this must be answered in the affirmative.

2. Was the Eighth Circuit's determination that the common law liabilities of a negligent tortfeasor-employee and his employer are not eliminated by imposition of a vicarious liability upon an ICC licensed lessor correct?

Respondent submits this must be answered in the affirmative.

RULE 28(1) - LISTING OF ALL PARENT COMPANIES, ETC.

1. Exclaibur Insurance Company of MN

   a. Parent Company - Excalibur Holdings, Inc., Nevada

   b. No Subsidiaries and Affiliates

2. Riechmann Enterprises

   a. No Parent Company, Subsidiaries or Affiliates

## B. LIST OF PARTIES

Respondent adopts petitioner's list of parties.

## C. TABLE OF CONTENTS



## TABLE OF AUTHORITIES

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### D. CITATION OF OPINION AND JUDGMENTS DELIVERED BELOW

Respondent adopts petitioner's citation.

### E. STATEMENT OF JURISDICTION

Respondent adopts petitioner's statement of jurisdiction.

## F. FEDERAL REGULATIONS INVOLVED

Respondent adopts petitioner's statement of federal regulations involved.

## G. STATEMENT OF THE CASE

This is a declaratory judgment action to determine which insurers should respond to defend and indemnify various defendants in suits for bodily injury damages resulting from a motor vehicle accident occurring on July 9, 1979, near Belfield, North Dakota. A tractor-trailer owned by Hamel and driven by its employee, Culver, collided with an automobile driven by Timothy Youngren. A third vehicle driven by Sheri Emch was also involved. The separate liability trial determined that Culver was 70 percent responsible and Emch, 30 percent, under North Dakota's comparative negligence law. That finding was affirmed by the Eighth Circuit and is not before this Court.

The Hamel truck with Culver as its driver had been leased to Riechmann Enterprises, Inc. (Riechmann) an Illinois based ICC licensed carrier, previous to the accident. The leased equipment and driver were used by Riechmann to transport cargo under its ICC permit. Culver had delivered a Riechmann dispatched load to Beulah, North Dakota, but Riechmann had no return cargo for Culver. Rather than return empty, Culver, acting on behalf of Hamel, engaged a "trip lease" through another carrier. Culver was enroute to Montana from Beulah, North Dakota, to pick up the cargo for the trip lease when the accident happened. Culver's truck was empty at the time of the accident. Riechmann possessed no interest in the revenue to be earned from the trip lease as that was an enterprise solely to benefit Hamel and Culver. Despite the fact

that Riechmann had no interest in this prospective load, Culver continued to display the Riechmann decals on the truck while enroute.

Grinnell had issued to Hamel an Illinois garage liability policy containing a special endorsement known as Automobile Hazard No. 1. Respondent Excalibur Insurance Company of Minnesota (Excalibur) had issued to Riechmann a policy of liability insurance.

The District Court, after entering an amended Order, determined that Grinnell insured both Hamel and Culver; that Culver was Hamel's agent; that Excalibur extended coverage only to Riechmann; that Riechmann possessed a vicarious liability to the public for Culver's negligence based upon ICC regulations; that Grinnell was secondarily "liable" and that neither Riechmann nor Hamel were entitled to indemnity from each other.

On appeal, the Eighth Circuit affirmed the District Court's finding that under Illinois law the Grinnell policy afforded coverage to Hamel and Culver for the accident. In its review of the issues of liability, the Eighth Circuit affirmed the District Court's finding that ICC regulations placed upon Riechmann a statutory liability to the public for the acts of Culver. The Eighth Circuit also observed that while the regulations may impose a liability to the public upon the ICC licensed lessor, they do not obviate either the liability of the negligent tortfeasor or that of his employer.

Having affirmed the liability of the various insureds, the Eighth Circuit proceeded to determine the priority of insurance coverages. By applying the applicable "other insurance" provisions of the Grinnell and Excalibur policies, the Eighth Circuit held that the coverages provided by Grinnell to Culver, Hamel and Riechmann were primary

to the loss and that Excalibur's coverage to Riechmann was excess. Petitioner does not challenge the Eighth Circuit's determination that the policy language makes its coverage primary and Excalibur's excess. The petitioner, Grinnell, was required to pay the incurred loss to the limit of its insurance coverage simply because it was the primary insurance carrier on the loss. In its essence this case is a garden variety insurance coverage dispute. The Eighth Circuit's opinion did not involve a controversial construction of the nature of an ICC carrier's statutory liability.

## H. SUMMARY OF ARGUMENT

The issues presented for review lack overall national importance and were correctly decided by the court below after full consideration.

## I. ARGUMENT AGAINST ALLOWANCE OF WRIT

### 1. The Eighth Circuit Correctly Applied State Law In Determining That Grinnell Extended Coverage To Hamel And Culver.

The issues of substantive insurance law for which review is sought present neither a federal question nor a constitutional issue. These issues are too narrow in scope and lack the national importance necessary to warrant review by this Court on certiorari. Furthermore, the issues were correctly decided. The Eighth Circuit's decision that the language of petitioner's insurance policy was ambiguous and thus extended coverage to Hamel and Culver is in accord with Illinois case law construing the identical policy provision. *Associated Indemnity Company vs. Insurance Company of North America*, 68 Ill. App. 807, 386 N.E.2d 529 (1979).

The Eighth Circuit's determination that the grant of coverage extended by petitioner's policy was not negated by an exclusionary clause is also well supported. *Wells vs. Allstate Insurance Company*, 327 F. Supp. 622 (D. S. Car. 1971); *Peterson vs. Marlowe*, 264 N.W. 2d 133 (Minn. 1977). These issues of insurance law are, in any case, state law issues and pose no issue of circuit conflict or of national importance.

### 2. The Eighth Circuit Was Correct In Determining That ICC Regulations Do Not Absolve A Tort Feasor From Liability.

Petitioner's assertion that the Eighth Circuit's decision is in conflict with decisions of this and other courts is based upon an apparently erroneous reading of the decision. The Eighth Circuit found that ICC regulations impose upon the ICC licensed carrier a vicarious liability for the negligent acts of petitioner's insured, Culver. Although not directly stated, the crux of the petition appears to be a claim that the statutory vicarious liability of the ICC carrier must be held to displace the liability of the negligent truck driver and his employer as determined under applicable state law theories of negligence and the doctrine of *respondeat superior*. This argument was deservedly rejected by the Eighth Circuit.

The Eighth Circuit's determination that the ICC regulations do not release a negligent tortfeasor from the consequence of his actions is consistent with the public policy behind the regulations and well established authority. The public policy of protecting the motoring public is satisfied by imposing a vicarious liability upon the regulated carrier who must demonstrate financial responsibility through the

procurement of insurance. It does not follow that the public carrier's statutory liability must exist in lieu of or even primary to, the established liability of the tortfeasor under state law. Eliminating or subordinating the liability of a negligent truck driver would endanger public safety on the highways and contravene the purpose of the ICC regulations by needlessly depriving the injured public of a source of recovery. Neither the Interstate Commerce Act nor the ICC regulations excuse Culver and Hamel from their respective liabilities or make those liabilities secondary to any vicarious liability Riechmann may have. *Carolina Casualty Company vs. Insurance Company of North America,* 595 F.2d 128 (3rd Cir. 1979); *Vance Trucking Company vs. Canal Insurance Company,* 249 F. Supp. 33 (D. S. Car. 1966), aff'd, 395 F.2d 391 (4th Cir. 1968), cert. denied, 393 U.S. 845 (1968); and *Simmons vs. King,* 478 F.2d 857 (5th Cir. 1973).

Petitioner's contention that the Eighth Circuit's holding is contrary to this court's opinion of *Transamerican Freight Lines, Inc. vs. Brada Miller Freight Systems, Inc.,* 423 U.S. 28, 96 S.Ct. 229, 46 L.Ed.2d 169 (1975) is incorrect. In *Brada Miller,* supra, this Court held that the ICC regulations did not prevent an ICC licensed carrier from receiving indemnity for any liability it derived from the regulations. In its discussion, this Court specifically noted that the regulations were not offended by making a negligent lessor bear the burden of its own negligence.

Likewise, petitioner's assertion that the Eighth Circuit's holding is in conflict with decisions of other circuits is unsupportable. There are no federal circuit court opinions holding that the ICC regulations absolve a negligent tortfeasor of his responsibility because of the separate vicarious

responsibility placed upon an ICC carrier. Petitioner fails to cite any authority attesting to this asserted conflict. The notion that the statutory liability of an ICC carrier is exclusive (the "sole" liability) is singular to petitioner and in direct contradiction with *Brada Miller*. Even if this singular notion was adjudged as law, Grinnell's determined liability would not be altered since it was Riechmann's primary insurance carrier: "We find Grinnell's garage liability policy applicable as providing primary coverage for the July 19th accident; to the extent of its policy limits, Grinnell must reimburse Excalibur for sums paid out under the judgments and the settlement of the Youngren claims; . . ." 722 F.2d 1406 (8th Cir. 1983).

## J. CONCLUSION

This case is not one of national significance. The issues of substantive state insurance law are restricted to a narrow area of insurance practice and present neither a federal question nor a constitutional issue. Those issues, together with questions concerning ICC regulations, were fully considered by the Court below and correctly decided in accord with well established authority. This case does not merit the attention of this Court.

Dated: April 1, 1984.

Respectfully submitted,

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